defendants could only have given so much of the residue of the conversation as tended to qualify that given in evidence by the plaintiff, and no more; that is, they could have given all upon the same subject. But there is no pretence that the plaintiff had directly or indirectly called for any declarations of the defendants concerning the agreement between them, and the conversation was admitted under the offer to show "what defendants may have said about plaintiff taking this claim."

The evidence was erroneously admitted, and we cannot say that it did not influence the result.

The judgment must be reversed and a new trial granted; costs to abide result.

RECENT ENGLISH DECISIONS.

In the Court of Queen's Bench, sitting in Banc after Hilary Term, 1861.[1]

LOUIS CASTRIQUE *vs.* SOLOMON LEVI BEHRENS AND OTHERS.

Declaration stated that the registered owner of a British ship mortgaged it, and on the 9th of April, 1855, the plaintiff became the mortgagee; that on the 8th June, 1854, the captain, while on a voyage, drew a bill at Melbourne, in Australia, on the owner in England, for necessary disbursements of the ship, in favor of L. & Co.; that L. & Co., without value, indorsed it to the defendants, British subjects residing in England; that the bill was dishonored; that the defendants, knowing the premises, and that the ship was about to call on her voyage at the port of Havre de Grace, in France, and that by the law of France the bonâ fide holder for value of such a bill (if a French subject) could take proceedings in the French courts and attach and sell the ship, conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts, and falsely represent that he was bonâ fide holder of the bill for value; and thereupon T., upon the arrival of the ship in a French port, took proceedings in the French courts, and therein obtained orders for the attachment and sale of the ship; and the plaintiff was deprived of his property in the ship: *Held*, that this being a judgment in rem, though in a foreign court, an action could not be maintained while it remained unreversed, as it was consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France, and allowed judgment to go by default, or

[1] 7 Jurist N. S., 1028.

even that he appeared in the French court, and the question whether T. was a holder of the bill for value was decided against him.

The question in this case arose on demurrer to a declaration, the substance of which is sufficiently stated in the preceding head note.

Hall, for the plaintiff.

A conspiracy to defraud the plaintiff, and deprive him of his property, as in the declaration set forth, though carried out abroad, is the subject of an action in the courts of this country. In *Coxe* vs. *Smithe*, 1 Lev. 119, it was held actionable to procure an officer of the custom-house to be deprived of his office by means of a false oath. In F. N. B., 116 D., it is said, "Conspiracy shall be maintainable against those who conspire to forge false deeds which are given in evidence, by which any person's land is lost;" and the precise mode of effecting the object by means of the fraud is immaterial (Lord Campbell, in delivering the judgment of the court in *Gerhard* vs. *Bates*, 2 El. & Bl. 476, 491; 17 Jur. 1097, 1100); and it is immaterial whether the false representation which causes the damage be made to the person himself or to another who has power to deprive the person of his property. [He also cited *Gregory* vs. *The Duke of Brunswick*, 6 Man. & G. 205; 7 Scott's N. R. 972.] As to the objection that this is an action for an abuse of the process of a foreign court, the first answer is, that the gist of the action is, that there was a conspiracy in this country to deprive the plaintiff of his property, by means of the two overt acts—the fraudulent indorsement of the bill, and the false representation made to the court abroad. Secondly, an action will lie for a conspiracy to abuse the process of the courts in this country, for which redress might be obtained otherwise than by action; a fortiori it will lie for an abuse of the process in foreign courts, when the court does not know whether the party injured has any mode of obtaining redress in the foreign country. [He cited *Grainger* vs. *Hill*, 4 Bing. N. C. 212; 5 Scott, 561; *Heywood* vs. *Collinge*, 9 Ad. & El. 268; *Whitelegg* vs. *Richards*, 2 B. & Cr. 45; *Daniels* vs. *Fielding*, 16 M. & W. 200; 10 Jur. 1061; and *Farlie* vs. *Danks*, 4 El. & Bl. 493; 1 Jur N. S. 331.] An action lies for a false affidavit, by which the process of the court is put in motion. (*Case of False Affidavits*, 12 Rep.

128.) [He also cited Willes, J., in *Revis* vs. *Smith*, 18 C. B. 126, 142; 2 Jur. N. S. 614, 616.] The rule, that the declaration should show the termination of the proceedings which are the ground of the action, is not applicable to a foreign judgment. The reason of the rule is, that there might be inconsistent or incongruous judgments on the records of the courts of this country. Further, this court has no means of knowing that the plaintiff could take proceedings to set aside the judgment in the French court. Also, an allegation that the termination of the proceedings was in favor of the plaintiff is not required, where the action is for an abuse of the law (Vaughan, J., in *Grainger* vs. *Hill*, 4 Bing. N. C. 212, 223), or where the proceedings were ex parte, because there is no opportunity of controverting them. *Steward* vs. *Gromett*, 7 C. B., N. S. 191; 6 Jur. N. S. 776. It appears on the face of this declaration that the plaintiff was not a party to the proceedings in the French court. Thirdly, if this judgment was a judgment in rem,[1] it is not conclusive, being shown to have been obtained by fraud. In *The Duchess of Kingston's case*, 2 Smith's L. C. 601, 633, 4th ed., speaking of a sentence of the ecclesiastical court, it is said, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the point, and not to be impeached from within, yet, like all other acts of the highest judicial authority, it is impeachable from without. Although it is not permitted to show that the court was mistaken, it may be shown that they were misled." The declaration does not allege that proceedings in rem were taken in France. "So it must appear that there have been regular proceedings to found the judgment or decree, and that the parties in interest in rem have had notice or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard." (Story's Confl. Laws, s. 592, p. 987, 3d ed.)

[1] See *Castrique* vs. *Imrie*, 8 C. B., N. S., 405, in which the Exchequer Chamber held that the judgment was in rem, reversing the judgment of the Court of Common Pleas, 8 C. B., N. S., 1; 6 Jur. N. S., 1058. See *Cammell* vs. *Sewell*, in error, 5 H & Norm., 728; 7 Jur. N. S., 918.

If this action will not lie, there is no remedy for the plaintiff against the defendants, who are English subjects resident in England. No criminal proceedings could be taken in this country against the defendants; they could not be charged as accessories to the fraud of Troteux in France.

Montague Smith, (with whom was *Watkin Williams*,) contra.—First, any abuse of the process of a foreign court, or any malpractice in relation to proceedings in such court, affords no ground of action in this country. An action will not lie against parties conspiring in England to do and to prosecute, and doing and prosecuting certain acts and proceedings in a foreign country, unless the doing and prosecuting such acts and proceedings by such conspiracy is illegal or a cause of action in the foreign country, and according to the law thereof. Assuming the proceeding in the court of France to be a proceeding in rem, if it was a judgment in this country this action would not lie. The proper course would be to get it reversed, or to apply to the court to take it off the file of the court. The sentence of a foreign Court of Admiralty, adjudging a ship to be lawful prize, is conclusive. (*Hughes* vs. *Cornelius*, 2 Show. 232, [see the special verdict set out in the note, p. 233,] S. C., 2 Smith's L. C. 604, 4th ed.) In note (Id. 614) it is said, "With regard to these judgments in rem, . . . they, like all others, ... are conclusive as to nothing which might have not been in question, or was not material. *The Attorney-General* vs. *King*, 5 Price, 195." [WIGHTMAN, J.—Which party is to show that the plaintiff was summoned, or had notice of the proceedings?] It is not to be presumed that the proper parties were not summoned, and that the court in France would not cause a proper summons to be issued before the property in the ship was sold and disposed of; and therefore it is for the plaintiff to show that he was not summoned. [WIGHTMAN, J.—It may be a valid judgment in rem, though the plaintiff knew nothing about it. As far as we know anything of the proceedings in rem, there is no occasion for notice to the true owner.] The declaration charges that the defendants conspired with Troteux that he should falsely and fraudulently represent that he was the bona fide holder of the bill for value. If that

was not true, evidence might have been given to the contrary. [He cited Hale, C. B., in *Vanderbergh* vs. *Blake*, Hardr. 194, 195, and Erle, C. J., in *Barber* vs. *Lesiter*, 7 C. B., N. S. 175, 187, 188; 6 Jur. N. S. 654.] [*Hall.*—At the time when the ship was attached the plaintiff had no notice, but before the ship was sold the plaintiff had notice. It is very doubtful whether the plaintiff could have intervened to prevent the sale of the ship.] Before an action can be brought for instituting proceedings, the proceedings must have terminated in favor of the plaintiff; *Whitworth* vs. *Hall*, 2 B. & Ad. 695; and that principle is not impeached in *Steward* vs. *Gromett*, 7 C. B., N. S. 191; 6 Jur. N. S. 776. If the plaintiff is damnified to an extent for which he is not recompensed by the judgment in his favor in France, this action might lie for the excess. In *Farlie* vs. *Danks*, 4 El. & Bl. 493; 1 Jur., N. S., 331, the bankruptcy was superseded before action brought. In *Collins* vs. *Cave*, 4 H. & Norm. 225; 5 Jur., N. S., 296, Pollock, C. B., said, (p. 229,) "If an action could be maintained for maliciously suing, I do not know when litigation would end; the next step would be an action for maliciously subpœnaing a witness;" and Martin, B., added, "An action for maliciously suing would involve a trial whether the judgment in the former action was right;" and as Hale, C. B., said in *Vanderbergh* vs. *Blake*, (Hardr. 195,) "If such an action should be allowed, the judgment would be blown off by a side-wind." [He also cited Jervis, C. J., in *Haddan* vs. *Lott*, 15 C. B. 411.] [WIGHTMAN, J.—In *Smith* vs. *Tonstall*, Carth. 3, it was held that an action would lie where the declaration charged that the defendant conspired with W. S. to defeat the plaintiff in recovering rent in arrear from W. S., by procuring W. S. falsely to confess a judgment to W. N., and that W. N. sued out execution upon that feigned judgment, by virtue whereof he seized the goods of W. S., and the plaintiff lost his debt. And it is added, (p. 4,) that the defendant brought a writ of error in Parliament, where the judgment was affirmed. And in *Saville* vs. *Roberts*, 1 Salk. 13, it is said, (p. 14,) "And yet, if one that is not concerned, as a stranger, procure another to sue me causelessly, I may maintain against him generally," referring to

F. N. B. 98, N.; 2 Inst. 444; and 3 Cro. 378. In 1 Com. Dig., by Hammond, "Action upon the Case for Conspiracy," 339, it is said: "So it lies for procuring an action to be brought against another maliciously," citing F. N. B., 116, E., and *Skinner* vs. *Gunton*, T. Raym. 176.] That is where special damage results. (Marginal Note to *Saville* vs. *Roberts*, 1 Ld. Raym. 380.) [WIGHTMAN, J.—It is also said in Com. Dig., that an action lies if a man "sue in the name of A. without his privity, though it be for a just debt." And in *Saville* vs. *Roberts*, 1 Ld. Raym. 380, "If a stranger who is not concerned excites A. to sue an action against B., B. may have an action against the stranger," citing F. N. B. 98, N., and 2 Inst. 444. All the authorities are collected in *Cotterill* vs. *Jones*, 11 C. B. 713, in which it was held that case will not lie against two persons for conspiring together maliciously and vexatiously, and without reasonable or probable cause, to commence and commencing an action against the plaintiff in the name of a third person, but for their own benefit, without an allegation of legal damage resulting to the plaintiff therefrom.] This is not an action for maliciously exciting persons who had no interest in the proceeding; the defendants were holders of the bill. [WIGHTMAN, J.—But they were holders without value.] Still the defendants might be entitled to hold the proceeds against all the world. [WIGHTMAN, J.—In F. N. B., 98, H., it is said, "If an action of debt be brought against two as executors, where one of them is not executor, if he who is not executor confess the action, he who is executor shall have a deceit against him, and recover as much in damages."]

June 7.—*Holl*, in reply.—A judgment in rem is not conclusive, except upon the precise point decided. The plaintiff does not seek to impeach the judgment of the Court in France as to the status of the ship itself, nor as to the facts necessary to enable that Court to arrive at its determination. [He cited Tayl. Ev., s. 1490, 3d ed.; Lord Ellenborough, in *Fisher* vs. *Ogle*, 1 Camp. 417, 418; and Tindal, C. J., in *Dalgleish* vs. *Hodgson*, 7 Bing. 495, 504.] It was for the defendants to show that the plaintiff had an opportunity of intervening before judgment was given; this Court cannot take cognisance of proceedings of which they have no knowledge. Even

if the plaintiff could take proceedings to set aside the judgment, will the Court compel him to seek justice abroad? Suppose war between this country and France. [COCKBURN, C. J.—That argument applies to any case. BLACKBURN, J.—Even when war is raging between this country and another, this Court gives credit to the judgment of the Admiralty Court of that country.] *Haddon* vs. *Lott*, 15 C. B. 411, and the cases in *Cotterill* vs. *Jones*, 11 C. B. 713, were decided on the ground that it was not shown that there was any damage to the plaintiff, or that the damage naturally flowed from the grievance charged in the declaration.

Cur. adv. vult.

Feb. 23.—CROMPTON, J., delivered the judgment of the Court.—In this case the demurrer to the declaration raises a question of some difficulty.

There is no doubt, on principle and on the authorities, that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage. (*Cotterill* vs. *Jones*, 11 C. B. 713; *Barber* vs. *Lesiter*, 7 C. B., N. S., 175; 6 Jur., N. S., 654.) But in such an action it is essential to show that the proceeding, alleged to be instituted maliciously and without probable cause, has terminated in favor of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be, that if, in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered, for another Court, not being a Court of appeal, to hold that the decision was come to without reasonable and probable cause.

In the present case, the proceedings were not instituted in the courts of this country, but they are stated to be proceedings in rem in the Courts of France. There is no direct authority on the point, but it seems to us that the same principle, which makes it objectionable to entertain a suit grounded on the assumption that the unreserved decision of a Court in this country was come to without reasonable and probable cause, applies where the judgment,

though in a foreign country, is one of a Court of competent jurisliction, and come to under such circumstances as to be binding in this country. A judgment in rem is, as a general rule, conclusive everywhere and on every one, and we do not think that the averments in the declaration show that this judgment in rem was obtained under such circumstances as to be impeachable by the present plaintiff. It is averred, and we must on the demurrer assume that it is truly averred, that by the law of France the judgment in rem can only be obtained if the holder of the bill of exchange be a French subject, and bona fide holds for value; and we must take it as admitted on this demurrer, that Troteux, the French holder of the bill of exchange, by the fraudulent procurement of the defendants, falsely represented to the French Courts that he was holder for value when he was not.

It is not necessary to say what would be the effect if it were stated that, by the contrivance of the defendants, the proceedings were such that the plaintiff had no opportunity to appear in the French Court and dispute the allegation. In the present case it is quite consistent with the averments in the declaration, that the plaintiff had notice of the proceedings in France, and purposely allowed judgment to go by default, or even that he appeared in the French Court, intervened, and was heard, and that the very question whether Troteux was a holder for value, was there decided against him.

We think on the principle laid down in *The Bank of Australasia* vs. *Nias*, 16 Q. B. 717, 15 Jur. 967, that the plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed this action cannot be maintained.

The declaration being thus, in our opinion, bad, and the defendants, therefore, entitled to our judgment, it is unnecessary to consider the sufficiency of the pleas.

Judgment for the defendants.